

1 Scott A. McMillan, SBN 212506
Michelle D. Volk, SBN 217151
2 The McMillan Law Firm, APC
4670 Nebo Dr., Suite 200
3 La Mesa, CA 91941-5230
Tel. 619-464-1500 x 14
4 Fax. 206-600-5095
Attorneys for Plaintiff and Petitioner,
5 Lycurgan, Inc.

6
7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA

9 LYCURGAN, INC., a California
corporation, d/b/a Ares Armor,

10 Plaintiff - Petitioner,

11 vs.

12 TODD JONES, in his official capacity
13 as Acting Director of the Bureau of
Alcohol, Tobacco, and Firearms
14 Enforcement,

15 Defendant - Respondent.

Case No.: 14-CV-1679 JAH JLB

OPPOSITION TO MOTION TO
DISMISS AMENDED
COMPLAINT

Judge: Hon. Janis L. Sammartino
Dept.: 4A

Date: January 7, 2016

Time: 1:30 p.m.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

TABLE OF CONTENTS

I.	Introduction	1
II.	Argument	1
A.	This Court is not divested of jurisdiction by an appeal, because no appeal is pending	1
B.	ATF cannot establish on this pleading motion that plaintiff’s claims are moot or non-meritorious.....	1
C.	This Court has jurisdiction over the CAFRA claim.....	6
III.	Conclusion.....	9

TABLE OF AUTHORITIES

CASES

<i>America W. Airlines, Inc. v. GPA Group, Ltd.</i> , 877 F.2d 793 (9th Cir. 1989).....	6
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	4
<i>Burlington N. Santa Fe R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation</i> , 323 F.3d 767 (9th Cir. 2003)	4, 5
<i>Butcher's Union Local No. 498, United Food & Commercial Workers v. SDC Inv., Inc.</i> , 788 F.2d 535 (9th Cir. 1986)	6
<i>In re Matthews</i> , 395 F.3d 477 (4th Cir. 2005)	7, 8
<i>In re Wilshire Courtyard</i> , 729 F.3d 1279 (9th Cir. 2013)	2
<i>Laub v. U.S. Dept. of Interior</i> , 342 F.3d 1080 (9th Cir. 2003)	5
<i>Rosales v. United States</i> , 824 F.2d 799 (9th Cir. 1987)	5
<i>Safe Air for Everyone v. Meyer</i> , 373 F.3d 1035 (9th Cir. 2004)	2
<i>Societe de Conditionnement en Aluminium v. Hunter Eng. Co., Inc.</i> 655 F.2d 938 (9th Cir. 1981)	5
<i>Wells Fargo & Co. v. Wells Fargo Exp. Co.</i> , 556 F.2d 406 (9th Cir. 1977)	6

STATUTES

18 U.S.C. § 983	8
28 U.S.C. § 1331	6, 7, 8

RULES

Federal Rule of Civil Procedure 12(b)(1)	2, 5, 6
Federal Rule of Civil Procedure 12(b)(6)	2, 3, 6
Federal Rule of Civil Procedure 12(d)	3
Federal Rule of Civil Procedure 56	3

1	Federal Rule of Civil Procedure Rule 56(f)	4
2		
3	OTHER AUTHORITIES	
4	California Practice Guide Federal Civil Procedure Before Trial ¶ 9:86.2 (The	
5	Rutter Group 2015).....	5
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		

1 **I. Introduction**

2 Defendant-respondent ATF admits that the evidence shows that it seized from
3 plaintiff-petitioner Lycurgan, and has not returned, property over which it now admits it
4 has no claim. Still, it maintains, a federal district court is without power even to address
5 its actions.

6 The law is to the contrary. This Court has jurisdiction to adjudicate this
7 controversy, despite ATF's unsupported assertion that the seized property simply
8 vanished through no fault of its own.

9
10 **II. Argument**

11 **A. This Court is not divested of jurisdiction by an appeal, because no**
12 **appeal is pending**

13 Defendants' argument that this Court lacks jurisdiction of this matter because of
14 a pending appeal has been overtaken by events. No appeal is pending. The Ninth
15 Circuit dismissed the appeal on November 18, 2015, specifically because this Court
16 allowed plaintiff to file an amended complaint. The order of dismissal is attached as
17 Exhibit A to the accompanying Declaration of Scott McMillan.

18
19 **B. ATF cannot establish on this pleading motion that plaintiff's claims**
20 **are moot or non-meritorious**

21 ATF also declares Lycurgan's complaint to be moot, solely on the basis of its
22 contention that it does not have possession of the 18 receivers that it seized from
23 Lycurgan but failed to return. ATF insists that the Court must accept this naked factual
24 assertion without giving Lycurgan any opportunity to challenge it.

25 ATF admits that when it seized the receivers, it "provided a receipt for the
26 property identifying 5804 firearms were seized by ATF." Hernandez Decl. ¶ 3. It
27 further admits that "the final count of EP Firearms returned to [Lycurgan] was 5786."

1 *Id.* at ¶ 5. It then declares, without explanation or substantiation, that “ATF does not
2 have any EP80s firearms seized from [Lycurgan] in its possession” *Id.* at ¶ 7.

3 In other words, ATF insists that this Court must presume that Agent
4 Hernandez is a competent percipient witness to testify that the property it seized
5 and failed to return is nowhere to found in ATF’s sprawling bureaucracy of nearly
6 5000 employees (<https://www.atf.gov/resource-center/pr/staffing-and-budget>),
7 and that he is testifying both truthfully and accurately. This is not a presumption
8 the Court may indulge on a motion to dismiss on the pleadings.

9 Preliminarily, it must be recognized that although ATF couches its motion as one
10 to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1), its contention
11 really goes to the merits of the controversy and is more properly viewed as a motion for
12 failure to state a claim under Rule 12(b)(6). As ATF puts it, the issue before the Court
13 is “Plaintiff’s right to equitable relief directing ATF to return the EP80s to Plaintiff.”
14 Motion at 8. ATF maintains that Lycurgan cannot establish this equitable right because
15 ATF supposedly has not kept any receivers – i.e., that Lycurgan will not be able to
16 prevail on the merits.

17 Under these circumstances, ATF cannot ask for dismissal on jurisdictional
18 grounds. “[W]hen the question of jurisdiction and the merits of the action are
19 intertwined, dismissal for lack of subject matter jurisdiction is improper.” *In re*
20 *Wilshire Courtyard*, 729 F.3d 1279, 1284 n. 4 (9th Cir. 2013), quoting *Williston Basin*
21 *Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold & Easement in the*
22 *Cloverly Subterranean, Geological Formation*, 524 F.3d 1090, 1094 (9th Cir.2008).
23 This is because a jurisdictional finding of genuinely disputed facts is inappropriate when
24 the jurisdictional issue and substantive issues are so intertwined that the question of
25 jurisdiction is dependent on the resolution of factual issues going to the merits of an
26 action. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

1 ATF evades identifying its motion as one for failure to state a claim under Rule
2 12(b)(6), because it wants to rely on evidence – the conclusory declaration of Agent
3 Hernandez. If matters outside the pleadings are presented on a motion under Rule
4 12(b)(6), the motion must be treated as one for summary judgment under Rule 56. Fed.
5 R. Civ. P. 12(d). The rule further provides that “[a]ll parties must be given a reasonable
6 opportunity to present all the material that is pertinent to the motion.”

7 ATF clearly has not presented an adequate summary judgment motion. It has not
8 established that there is no genuine dispute as to the material fact of whether it
9 possesses receivers belonging to Lycurgan that it should return. It has merely presented
10 a single declaration giving the unsupported opinion of one of its employees that the
11 receivers are mysteriously no longer in its possession. This is directly contradicted by
12 its admission that it inventoried 5804 receivers when it seized them but 5786 when it
13 returned them.

14 Even worse, though, ATF’s motion relies on thoroughly disputed facts. ATF
15 asserts, without evidentiary support, that it “believes” “there was a counting error when
16 the EP80s were originally seized.” Motion at 8. This is directly contrary to the sworn
17 declaration of a percipient witness. The count was undertaken carefully and
18 meticulously, and there is no reasonable probability that it was inaccurate. Karras Decl.
19 at ¶ 3.

20 Further, Agent Hernandez maintains that “[o]n December 22, 2014, . . . [t]here
21 was no indication that the storage facility had been breached or that any of the original
22 boxes containing the seized firearms had been opened.” Hernandez Decl. at ¶ 4. This
23 representation is somewhat misleading, because the property was returned on December
24 23, 2014, not December 22. *Id.* at ¶ 5. On December 23, when ATF did return the
25 boxes, two percipient witnesses observed that some of the boxes *had* in fact been
26 tampered with, and that the boxes that had been tampered with were the ones from
27 which receivers were missing. McMillan Decl. at ¶¶ 4-8; Karras Decl. at ¶ 4-8.

1 In any event, the Court cannot even address this summary judgment motion at
2 this point because Lycurgan has had no opportunity to take evidence on ATF's
3 implausible new factual assertion that the 18 receivers it took from Lycurgan and never
4 returned have vanished into thin air. Rule 56(f) provides:

5 If a nonmovant shows by affidavit or declaration that, for specified
6 reasons, it cannot present facts essential to justify its opposition, the court
7 may:

8 (1) defer considering the motion or deny it;

9 (2) allow time to obtain affidavits or declarations or to take
discovery; or

10 (3) issue any other appropriate order.

11 Although this rule is couched in terms of the court's discretion, both the Supreme
12 Court and the Ninth Circuit have held that the rule *requires* rather than merely permits
13 discovery by the non-moving party where it "has not had the opportunity to discover
14 information that is essential to its opposition." *Burlington N. Santa Fe R. Co. v.*
15 *Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 773 (9th Cir.
16 2003), quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5, 106 S.Ct. 2505,
17 91 L.Ed.2d 202 (1986). Lycurgan has had no such opportunity. Where documentation
18 or witness testimony may exist that is dispositive of a pivotal question, lightning-quick
19 summary judgment motions can impede informed resolution of fact-specific disputes.
20 *Ibid.*

21 Since this case is still at the pleading stage; Lycurgan has not been allowed to
22 take any discovery at all. The accompanying declaration of Scott McMillan at
23 paragraph 9 details some of the discovery that Lycurgan might take to probe ATF's
24 assertion that the receivers have somehow vanished without explanation. However,
25 where no discovery whatsoever has taken place, the opposing party cannot be expected
26 detail with great specificity the kind of discovery likely to turn up useful information, as
27

1 the ground for such specificity has not yet been laid. *Burlington N. Santa Fe R. Co.*,
2 323 F.3d at 774.

3 Even if the Court were to treat ATF's motion strictly as a Rule 12(b)(1) motion
4 challenging subject matter jurisdiction, for which the Court may consider evidence, the
5 motion still cannot be decided until Lycurgan has had an adequate opportunity for
6 discovery. Where (unlike here) the jurisdictional facts are not intertwined with the
7 merits, a district court may hear evidence and make findings of fact necessary to rule on
8 the subject matter jurisdiction question prior to trial. *Rosales v. United States*, 824 F.2d
9 799, 803 (9th Cir. 1987).

10 If the Court decides the jurisdictional issue on the papers, plaintiff is required
11 only to make a prima facie showing of subject matter jurisdiction. *Societe de*
12 *Conditionnement en Aluminium v. Hunter Eng. Co., Inc.* 655 F2d 938, 942 (9th Cir.
13 1981); Cal. Prac. Guide Fed. Civ. Pro. Before Trial ¶ 9:86.2 (The Rutter Group 2015).
14 As is discussed above, the Karras and McMillan declarations establish that the receivers
15 were accurately counted when ATF boxed them, that the boxes were tampered with
16 before ATF returned them, and that receivers were missing from the tampered-with
17 boxes. This is more than a prima facie showing on the one jurisdictional issue ATF
18 raises.

19 If the Court chooses to treat ATF's motion as a jurisdictional motion under Rule
20 12(b)(1), and the Court believes the foregoing is not sufficient to defeat ATF's motion,
21 then Lycurgan requests that the Court hold an evidentiary hearing. However, before
22 such a hearing can be conducted, the Court should grant Lycurgan leave to take
23 sufficient discovery so that it can present competent evidence.

24 In its earlier order granting ATF's motion to dismiss the original complaint at
25 page 3, this Court observed:

26 [I]n response to a Rule 12(b)(1) motion based on a factual attack, the non-
27 moving party may be entitled to discovery related to the jurisdictional
question. See *Laub v. U.S. Dept. of Interior*, 342 F.3d 1080, 1093 (9th Cir.
2003). Discovery should be granted "when . . . jurisdictional facts are

1 contested or more facts are needed” to determine a question of
jurisdiction. *Id.*¹

2 Order Granting Defendant’s Motion to Dismiss (ECF #19, Ex. 2 to Motion) at 3.

3 Discovery should ordinarily be granted where pertinent facts bearing on the
4 question of jurisdiction are controverted or where a more satisfactory showing of the
5 facts is necessary. *Butcher's Union Local No. 498, United Food & Commercial*
6 *Workers v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986). Again, the McMillan
7 Declaration at paragraph 9 lays out some of the discovery that might appropriately be
8 undertaken.

9 Regardless of whether the Court treats ATF’s motion as one under Rule 12(b)(1)
10 or 12(b)(6), the one thing the Court cannot do at this stage is grant the motion without
11 giving Lycurgan the opportunity to take discovery and refute ATF’s unsupported factual
12 assertion.

13 **C. This Court has jurisdiction over the CAFRA claim**

14 ATF’s third and final contention is that this Court lacks jurisdiction over this
15 action under CAFRA. Motion at 8-9. It does not actually present any argument in
16 support of this proposition. Instead, it vaguely references its briefs and the Court’s
17 decisions on ATF’s earlier motion to dismiss and Lycurgan’s motion for a new trial.

18 First, it should be understood that jurisdiction is not grounded in CAFRA, it is
19 grounded in 28 U.S.C. § 1331, which gives the Court jurisdiction over all civil actions
20 arising under the laws of the United States. CAFRA is a law of the United States. If
21

22
23 ¹ The Court further observed:

24 However, “when it is clear that . . . discovery would not demonstrate facts
25 sufficient to constitute a basis for jurisdiction,” a Court need not grant a
26 discovery request prior to ruling on a Rule 12(b)(1) motion. *America W.*
27 *Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 801 [(9th Cir. 1989)]
(quoting *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 431,
n. 24 [(9th Cir. 1977)]).

Here, however, discovery could well demonstrate that ATF still has some of Lycurgan’s
property in its possession.

1 Lycurgan's action arises to any extent under CAFRA, this Court has jurisdiction by
2 virtue of § 1331.

3 The Court's order granting the previous motion to dismiss addressed a different
4 issue. The Court based its decision solely on *In re Matthews*, 395 F.3d 477 (4th Cir.
5 2005). It held:

6 [T]he Court finds persuasive the principle announced in *In re Matthews*,
7 that when the government voluntarily dismisses a forfeiture action the
8 district court's jurisdiction over the forfeiture action is divested. This
9 principle applies regardless of whether the case is voluntarily terminated
before or after the filing of a forfeiture complaint.

10 Order Granting Defendant's Motion to Dismiss (ECF #19, Ex. 2 to Motion) at 6.

11 *Matthews*, however, concerned a different question from the one presented here.
12 There the United States government had seized a document in which both an individual
13 and a state claimed an ownership interest, and filed a forfeiture action. 395 F.3d at 479.
14 The United States thereafter abandoned its forfeiture action, but the District Court
15 nevertheless undertook to adjudicate the disputed claim of ownership between the
16 individual and the state. *Id.* at 479-980. The Court of Appeal held that the District
17 Court lacked jurisdiction to adjudicate these claims between two private parties, because
18 the federal forfeiture statutes did not give the court authority to adjudicate a dispute
19 between two third parties over property no longer claimed by the United States. *Id.* at
20 481. "Although other interested parties submitted statements of interest during the
21 course of the forfeiture action, they did not assert freestanding claims that could be
22 adjudicated independently of that action." *Id.* at 483.

23 Here, however, CAFRA does establish that Lycurgan has a claim against the
24 United States for the return of its property. That right arises *after* the United States
25 elects not to pursue a forfeiture action. CAFRA provides:

26 (A) Not later than 90 days after a claim has been filed, the Government
shall file a complaint for forfeiture

27 (B) *If the Government does not—*

1 (i) *file a complaint* for forfeiture or return the property, in
2 accordance with subparagraph (A); or

3 (ii) before the time for filing a complaint has expired—

4 (I) obtain a criminal indictment containing an
5 allegation that the property is subject to
6 forfeiture; and

7 (II) take the steps necessary to preserve its
8 right to maintain custody of the property as
9 provided in the applicable criminal forfeiture
10 statute,

11 *the Government shall promptly release the property* pursuant to
12 regulations promulgated by the Attorney General, and may not take any
13 further action to effect the civil forfeiture of such property in connection
14 with the underlying offense.

15 18 U.S.C. § 983 (emphasis added).

16 Hence, unlike the private individual pressing a claim against a state in *Matthews*,
17 Lycurgan has a specific claim against ATF that arises *after* the United States fails to file
18 a forfeiture complaint. This right is created by a federal statute. Lycurgan's claim
19 under this right is therefore subject to this Court's jurisdiction pursuant to 28 U.S.C.
20 § 1331.

21 The Court anticipated that such a claim might arise in the future in its order
22 granting the earlier motion to dismiss. There it concluded by observing:

23 If the government ceases to pursue its forfeiture proceeding and there is
24 no parallel reason for the government's continued seizure of the property
25 in question, *the property will be returned*.

26 Order Granting Defendant's Motion to Dismiss (ECF #19, Ex. 2 to Motion) at 6
27 (emphasis added). The Court's optimistic prediction unfortunately has not come to
pass; even though the government has ceased to pursue its forfeiture proceeding, the
property has not all been returned. It is therefore necessary for Lycurgan to pursue this
action, and for this Court to exercise jurisdiction over it.

The other order on which ATF relies, the order denying Lycurgan's motion for
new trial but granting it leave to amend, makes no determination of jurisdiction at all.
Instead, it merely holds:

